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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Regulation Involved	2
Question Presented	5
Statement of the Case	6
ARGUMENT—A regulation which requires reasonable notice prior to termination of welfare benefits, gives a welfare recipient with the right to legal counsel an opportunity to present any written evidence or reasons as to why benefits should not be terminated and continues benefits until a decision is reached meets the requisite standards of due process of law particularly where a review of the decision under more formal procedures is readily available	9
Conclusion	19

CASES CITED

Cafeteria and Restaurant Workers Union v. McElroy, 367 U. S. 886 (1961)	9
Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961)	9, 10
Federal Communications Commission v. W. J. R., 337 U. S. 265 (1949)	10
Hanah v. Larche, 363 U. S. 420 (1966)	9

PAGE

Madera v. Board of Education of City of New York, 386 F. 2d 778 (2nd Circ., 1967) cert. denied 390 U. S. 1028 (1968) 10

Phillips v. Commissioner, 283 U. S. 589 (1931) 10

Reaves v. Ainsworth, 219 U. S. 296 (1911) 9

Snell v. Wyman, 281 F. Supp. 853 (D. Ct., N. Y. 1968), affirmed 393 U. S. 323 (1969) 12

United States v. Wood, 61 F. Supp. 175 (D. Ct., Mass., 1945) 10

Wheeler v. Montgomery, et al (Northern District of California, No. 48303, April 17, 1968, appeal docketed, 37 U. S. L. W. 3152, Oct. 22, 1968, No. 634 17,18

STATUTES CITED

United States Constitution:

Fourteenth Amendment 6

28 United States Code:

Section 1253 2

Section 2281 2

Section 2284 2

42 United States Code:

Section 301, et seq. 6

Section 1983 2,6

New York Civil Practice Law and Rules:

Article 78 8

PAGE

Social Service Law:
§ 104 12
§ 360 12

New York Civil Service Law:
Section 75 18

New York Education Law:
§ 2573(7) 18

OTHER AUTHORITIES CITED

18 Codes Rules and Regulations of the State of New York:
351.26 .....1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 15
352.5 8

New York City Department of Social Services Procedure No. 68-18 .....8, 13, 16

United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140 8

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

Appellant appeals from an order (393a-395a) of the United States District Court for the Southern District of New York granting appellees' motion for a preliminary injunction staying all proceedings under 18 Codes Rules and Regulations of the State of New York 351.26(b), relating to the termination of benefits to persons receiving public assistance, and denying appellant's motion for a summary judgment dismissing the complaints in these consolidated actions.

Appellant's jurisdictional statement was filed on March 6, 1969. This Court noted probable jurisdiction on April 21, 1969.

Opinion Below

The opinion of the District Court is reported at 294 F. Supp. 893 (S.D.N.Y. 1968). It is set out in The Appendix at pp. 365a-392a.

Jurisdiction

This appeal is taken pursuant to title 28 of the United States Code, Section 1253.

In their complaints (10a-28a; 66a-75a; 167a-200a), appellees, who are welfare recipients in New York City, sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, Title 42 United States Code, Section 1983. A three judge court was convened pursuant to Title 28 United States Code, Sections 2281 and 2284. Thereafter, on November 26, 1968 the three judge court issued its decision granting appellees' motion for a preliminary injunction and denying appellant's motion for a summary judgment. The order appealed from was issued on December 13, 1968. The text of the order is set forth at pp. 393a-395a of the Appendix. Appellant's notice of appeal to this Court was filed in the Southern District of New York on January 6, 1969.

Regulation Involved

Title 18 N.Y.C.R.R., Section 351.26, is the regulation involved on this appeal. That section provides as follows:

STATE DEPARTMENT OF SOCIAL SERVICES

Albany, New York

351.26. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official pur-

poses to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to; the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the

proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may

not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Date: April 26, 1968

Questions Presented

Does a regulation which

1. requires seven days' notice to beneficiaries of public assistance of an intent to terminate benefits,

2. provides that the reasons for the proposed termination be set forth in the notice,

3. affords beneficiaries an opportunity to obtain a review of the proposed action and to submit any written statement or other evidence to demonstrate why this grant should not be terminated,

4. mandates that the reviewing officer be a person in a superior position to the supervisor who approved the proposed termination, and

5. continues public assistance until the review is completed

comply with due process of law particularly in light of the facts that (a) a subsequent fair hearing is available to review any errors that may occur and (b) any benefits improperly withheld will be restored?

Statement of the Case

This action was brought by appellees, who are recipients of public assistance, for a declaratory judgment and for an injunction. They sought a declaration that the regulation (New York State Department of Social Services, Regulation, § 351.26) governing the termination of public assistance, provided pursuant to Title 42 of the United States Code and the Social Welfare Law of New York, is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution and is otherwise unlawful in that it violates the Social Security Act. Specifically, appellees asserted that the regulation fails to provide for adequate notice and an opportunity for a hearing which satisfies standards of due process of law prior to termination or suspension of public assistance.

They also sought and the court below granted an injunction restraining defendants from terminating or sus-

pending public assistance prior to a hearing of a type which the appellees regarded as necessary to meet standards of due process of law. Appellees claimed that they and persons similarly situated have been or may be unconstitutionally deprived of public assistance under the procedures challenged.

The applicable regulation (Section 351.26) of the New York State Department of Social Services was amended after this action was commenced but prior to the convening of the three judge court. The present regulation is set forth in full *supra* and is in the Appendix at pp. 127a-130a.

Under the State regulation, the Commissioner of Social Services of New York City had the option of following a State procedure for termination of benefits (§ 351.26[a]) or adopting local procedures which comply with the standards of § 351.26(b). Defendant Goldberg elected to proceed under § 351.26(b), and he presented a plan under that section which was approved.

New York City adopted local procedures to carry out its obligations under § 351.26(b) which became operational on May 27, 1968. These procedures (No. 68-18) are set forth in Exhibit "1" to Commissioner Goldberg's affidavit of June 14, 1968 (147a-149a).

Thus, in order to consider the questions presented here the Court should examine the text of § 351.26 as implemented by New York City in its Procedure No. 68-18.

The present procedure for termination of public assistance in New York City involves the following steps: (1) discussion by a caseworker with a client as to reasons for proposed discontinuance of assistance; (2) report by caseworker to his unit supervisor; (3) approval by unit supervisor of proposed discontinuance; (4) a notice of proposed discontinuance with the reasons therefor sent to the client. The notice also advises the client

that he may request a review of the proposed discontinuance within seven days and that he may submit any statement or document in writing, personally or through an attorney or any other representative to show his continued eligibility to receive public assistance. (5) Where a review is requested, a review officer, who is superior in position to the unit supervisor, reviews the case record and any material submitted by the client. Assistance is not terminated unless and until the review officer makes a decision adverse to the client. (6) If the decision is to discontinue assistance, the case record is returned to the unit supervisor and, in turn, to the caseworker who sends written notice of the decision to the client. This notice states the reasons for discontinuance and advises the client of his right to a Fair Hearing. (7) Thereafter a Fair Hearing before State officials will be held if requested and, if the result is adverse to the client, the determination is subject to judicial review under Article 78 of the New York Civil Practice Law and Rules. Federal and New York State regulations require that, where an incorrect decision is made adverse to the client, the agency must make corrected payments retroactive to the date the incorrect action was taken (322a-323a).

The procedure just outlined is derived from Regulation 351.26 and 352.5 of the New York State Department of Social Services; Procedure No. 68-18 of the New York City Department of Social Services; and United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140.

ARGUMENT

A Regulation Which Requires Reasonable Notice Prior to Termination of Welfare Benefits, Gives a Welfare Recipient with the Right to Legal Counsel An Opportunity to Present Any Written Evidence or Reasons as to Why Benefits Should Not Be Terminated and Continues Benefits Until a Decision Is Reached Meets the Requisite Standards of Due Process of Law Particularly Where a Review of the Decision Under More Formal Procedures Is Readily Available.

(1)

The formalities of judicial proceedings are not required at every stage of the administrative process, particularly where judicial review is available to correct error. "The requirements of due process frequently vary with the proceeding involved." *Hannah* v. *Larche,* 363 U. S. 420, 440 (1960). "What is due process of law must be determined by circumstances." *Reaves* v. *Ainsworth,* 219 U. S. 296, 304 (1911); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150, 155 (1961).

In *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886 (1961), the court stated (pp. 894-895):

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation. [citations omitted] '"[D]ue process", unlike some legal rules is not a technical conception with fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162-163 (concurring opinion)."

Oral presentations are not invariably required. In *Federal Communications Commission* v. *W. J. R.*, 337 U. S. 265 (1949), the court said (p. 275):

> "[D]ue process of law has never been a term of fixed and invariable content. This is true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner* v. *Denver*, 210 U. S. 373, in others that argument submitted in writing is sufficient. *Morgan* v. *United States*, 298 U. S. 468, 481."

Similarly the participation of legal counsel is not always required in administrative proceedings. *Madera* v. *Board of Education of City of New York*, 386 F. 2d 778 (2nd Circ., 1967), cert. denied 390 U. S. 1028 (1968); *Dixon* v. *Alabama State Board of Education, supra.*

Under appropriate circumstances it is permissible for the government to act first and conduct all review proceedings later. In *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), the court stated (pp. 595-597):

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> * * *
>
> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

In *United States* v. *Wood*, 61 F. Supp. 175 (D. Ct., Mass., 1945), the court stated (p. 179):

"It is clear that, when administrative action is taken in an adversary proceeding without affording adequate notice and opportunity to defend to interested parties, basic constitutional rights are invaded • • • This does not mean that the hearing must invariably precede the administrative action. Where considerations of administrative expediency weigh heavily, and where opportunity for a full and adequate hearing is available within the administrative process, no fundamental rights are transgressed when the hearing follows, rather than precedes, the action of the administrative agency."

This Court, as illustrated above, has not defined "due process" as a set of rigid rules applicable regardless of the circumstances. Where private rights of life or liberty are in jeopardy, as in criminal proceedings, strict adherence to procedural safeguards is necessary. Where, however, the action in question is administrative in nature, subject to later judicial scrutiny, flexibilty of procedure appropriate to protect both the individual and the state is permissible.

(2)

There are hundreds of thousands of persons receiving public assistance in New York City. The cost of the program is enormous. The New York City Budget for 1966-67 provided $587,807,056 for public assistance (The City Record, 6/30/66, p. 52). For 1967-68 the figure was $839,155,551 (*id.* 6/29/67, p. 75). There is no reason to assume this figure will decline in the immediate future. There are obviously thousands of personal tragedies behind the statistics of public assistance. The need for aid is acute and in many cases chronic. The individual cases rightfully should elicit compassion, understanding and

financial aid. A civilized society should do no less and probably should do much more than has been done to date.

This does not mean, however, that the program adopted by the legislature and supported by hundreds of millions of dollars should be administered without some regard for fiscal and administrative control. Some people apply for assistance who are not eligible. Some who are eligible later become ineligible and must be removed from the rolls.

In *Snell* v. *Wyman*, 281 F. Supp. 853, 859 (D. Ct., N. Y., 1968) affirmed 393 U. S. 323 (1969), former Commissioner of Welfare Mitchell Ginsberg testified that his office had "a dual responsibility. One is to the client and the other is to the accountability of the appropriate use of the public funds." The *Snell* case challenged the constitutionality of the recovery provisions of the Social Service Law (§§ 104, 360) and regulations. In sustaining the statute the court stated (p. 865):

> "Urging that the statutes be erased sweepingly on their face, plaintiffs ignore the fact that the discretion conferred upon administrators is subject to test and check both in administrative 'fair hearings' • • • and on judicial review under N. Y. CPLR Article 78."

(3)

The court below was properly concerned about the condition of welfare recipients and the added difficulties they would experience in the event of an erroneous decision to terminate benefits. It selected as case examples, however, persons whose benefits had been terminated without notice and without any opportunity for review under prior procedures superseded by the adoption of the regulation now challenged. Although the District Court sustained Section 351.26(a), as interpreted, it nevertheless struck down Section 351.26(b) as unconstitutional. Its conclusion seems to be based largely on prior terminations ef-

fective before any review procedures were in effect. The District Court did not measure Section 351.26(b) against the results obtained under its prior review procedures, but found it unconstitutional on its face as deficient in due process in light of the experience of beneficiaries who had no prior review at all.

This conclusion was not warranted under the circumstances. Section 351.26(b) can be made to work fairly, particularly when implemented under the carefully drawn provisions of New York City Procedure No. 68-18 (147a-149a). There was no basis on which the District Court could predict that this newly adopted regulation would fail to protect welfare recipients and provide them in practice with at least the minimum requirements of due process of law. The regulation did not become effective until May 27, 1968, in New York City. This case was argued below on June 26, 1968.

Appellees claimed that, even in the few weeks between the effective date of the regulation in New York City and the hearing before the three-judge Court, the regulation was not being implemented to their satisfaction. It was asserted that some of the notices were inadequate and, in effect, that errors might still occur. Under any new procedures affecting thousands of persons it is likely that errors may occur. They need not be fatal. They need not go uncorrected. Appellant was determined to implement the new regulation in a manner sympathetic and responsive to the rights of welfare beneficiaries and consistent with his duty to avoid waste of public funds. Section 351.26(b), as implemented by Procedure No. 68-18, affords adequate protection for appellees' rights and its use should not have been enjoined.

Since the Court below heard this case shortly after the implementation of the new procedure, the statistical record of performance under it is limited. However, the affidavit

of appellant Goldberg (320a-321a), submitted after argument, showing the experience of the Department of Social Services for the period May 27, 1968 to July 1, 1968, includes the following data:

Number of Notices of Intent to Suspend or Discontinue Assistance	1094
Number of requests for review	145
Time Lapse between date of request for review and the date of the decision	
one day	33
two days	23
three days	13
four days	14
five days	16
six days	5
More than six days	20
Number Sustained	69
Number Reversed	55
Pending	21

These figures alone should have led the Court below to deny the preliminary injunction sought by plaintiffs. The percentage of reversals exceeded the average percentage of reversals after a Fair Hearing on cases discontinued before the new procedures were adopted.

The Court below noted (376a, n. 17) that only about 64% of cases involving discontinuance of welfare benefits were affirmed after Fair Hearings during the period April through August, 1968 but later figures for September and October, 1968 showed a higher percentage.

Since the procedure attacked here was implemented in New York City on May 27, 1968, the earliest gauge of how the system stood up on review in Fair Hearings would

begin with the figures for July, 1968. The record sets forth these figures for July through October, 1968 on a statewide basis as follows (358a-362a):

	July	*August*	*September*	*October*
Affirmed	17	15	7	26
Reversed	3	3	0	3
Reversed in part	0	0	0	0
Remand	0	1	0	2
Misc.	0	3	1	2
Totals	20	22	8	33

Assuming that every reversal occurred in a case originating in New York City—and this is not clear from the record—then 9 out of 65 cases or 13.8% were reversed. This is a substantial improvement over the prior record when cases of discontinuances went to the fair hearing stage without the pretermination procedures under § 351.26(b), as implemented in New York City under its local procedure No. 68-18. It should also be noted that many of the decisions reached during the months of July through October, 1968 related to cases brought prior to May 27, 1968, the beginning of pretermination proceedings under Procedure No. 68-18 in New York City. In short, the introduction of the new system led to a sharp increase in affirmances of decisions to discontinue benefits after review by a Fair Hearing.

Despite this record which was still improving, the Court below found the new procedures defective as a denial of due process. Experience over a longer period, during which the after effects of the old system would have dissipated, might well have demonstrated on the basis of statistical data that the new system was constitutionally adequate. The District Court, however, after discussing case histories of welfare recipients whose benefits were terminated prior to the implementation of § 351.26(b),

concluded that the damage that might flow from an erroneous determination was so substantial that further procedural safeguards were required as a matter of constitutional right (372a-377a).

Essentially the District Court found § 351.26(b) defective in two respects: (1) lack of sufficient disclosure to the client of the reasons and evidence in support of termination; and (2) lack of an opportunity for a personal appearance and confrontation of adverse witnesses before the review officer. There is nothing, however, that would prevent a court from reading a requirement of adequate disclosure into the notice which is provided (see form 3c annexed to procedure No. 68-18 following p. 148a). There was no intent to be mysterious on the part of appellant. More detail as to the basis of the proposed termination could be supplied where required.

The Court below evidently overlooked or gave no weight to the requirement in Procedure No. 68-18 that the caseworker prior to sending out a notice of intent to suspend benefits must have a discussion and make a record of a discussion with the client as to "the reasons for the proposed suspension or discontinuance of assistance" (Procedure No. 68-18, p. 2, following p. 148a). A personal conference is a part of the procedure under attack and can be used by the client as an opportunity to get whatever information is needed to understand the reasons for the proposed termination. More formal procedures are available at the Fair Hearing stage should an adverse decision be reached under § 351.26(b).

In sum, the system adopted by New York City in practice could have worked and in fact was working to protect the rights of welfare beneficiaries and the taxpayers who have the right to expect that persons who are not qualified to receive benefits will be terminated with some degree of promptness consistent with due process. On the record presented here it was error to strike down the procedure in

effect in New York City as constitutionally defective on its face.

(4)

In *Wheeler* v. *Montgomery, et al.*, questions very similar to those presented here were raised before a three-judge court. The California procedure, among other things, called for a conference between the client and "his case-worker, an eligibility worker, or another responsible person in the county department" to discuss the question of termination of assistance. Notice of the meeting was to be sent not later than three days prior to the next date a client might expect to receive a payment. The plaintiffs objected to the procedure on five grounds:

> "(1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an 'impartial' referee;
>
> (2) the three day notice requirement is too short;
>
> (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence present at the conference;
>
> (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required."

In sustaining the California procedure the court stated:

> "The constitutionality of the 'informal conference' must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks. At present such 'fair hearing' is required to be given within 45 days and a decision rendered within the next 75 days. As of July 1, 1968, the hearing and decision will be required to be made within 60 days."

A comparison of the New York provisions on termination with those sustained in *Wheeler* indicates that the New York provisions offer a more adequate opportunity for a meaningful review of the client's status prior to termination than the provisions approved in *Wheeler*.

Even if this were not true, it does not follow that the New York procedure is unconstitutional. Uniformity among the states is not required although all must meet the same minimal standards.

In New York a person on public assistance must get at least seven days notice prior to termination. If the client requests a review of the proposed discontinuance, assistance will continue until the review officer makes his determination. If the review officer commits error, assistance payments will be restored in full retroactively after a Fair Hearing (322a-323a). By comparison, a civil service employee can be suspended without pay for 30 days by immediate action of his department head who intends to prefer charges against him under Section 75 of the New York Civil Service Law. Similarly, teachers may be suspended without pay for 90 days pending disposition of charges (New York Education Law, § 2573[7]). In both instances, if the charges are dismissed, the employee is entitled to reinstatement with full back pay. The reasons for these statutes have application here. Public money should not be paid out to persons who are not entitled to receive it.

Appellant does not claim that thousands of cases can be processed without error. Where error occurs however, it does not necessarily follow that the procedures are constitutionally defective, especially where both Fair Hearing procedures and judicial review are available to correct administrative mistakes. The present procedures strike a reasonable balance between the needs and rights of the welfare client and the need to protect the public's tax revenues. The policy at the federal, state and local level is clear: assistance must be provided for those who qualify

but all reasonable efforts must be made to terminate promptly but fairly payments to all those who become ineligible. The procedures adopted in New York City for termination of public assistance should have been sustained.

CONCLUSION

The decision below should be reversed. The injunction should be vacated. Appellant's motion for a summary judgment should be granted, and the complaints should be dismissed.

June 27, 1969.

Respectfully submitted,

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